

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA WAYLAND, as Guardian of
THELMA JOHNSON, an Incapacitated Individual,

Plaintiff-Appellant,

v

NEW LIGHT NURSING HOME
CORPORATION, d/b/a NEW LIGHT NURSING
HOME,

Defendant-Appellee.

UNPUBLISHED
September 20, 2007

No. 271821
Wayne Circuit Court
LC No. 02-2311290-NM

Before: Borrello, P.J., and Jansen and Murray, JJ.

MURRAY, J., (*dissenting*).

Factually, this case is straightforward. Conceptually, however, it is anything but straightforward. Nevertheless, after reviewing the entire record, and in particular plaintiff's complaint, and in view of the controlling law, it is my conclusion that the trial court was correct in setting off the \$27,500 settlement amount from the \$125,000 arbitration award. Consequently, and with all due respect to my colleagues, I dissent.

No one disagrees on what the law provides. As the majority notes, in *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002), we noted the general rule that only one recovery is allowed per injury. "The common-law rule of set off is predicated on the principle that a plaintiff is entitled to only one recovery for his injury." *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 250; 660 NW2d 344 (2003). "To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated." *Grace, supra* at 368. "Thus, where a recovery is obtained for any injury identical with another in nature, time and place, that recovery must be deducted from the plaintiff's other award." *Id.* at 369.

We are therefore instructed by these decisions to determine whether plaintiff has obtained two payments for the same injury. According to plaintiff's short, 14-paragraph complaint, plaintiff's mother was admitted to defendant nursing home on March 28, 2000. The complaint further alleges that on September 5, 2000, plaintiff's mother was struck by another resident, and on December 6, 2000, she was again attacked by the same resident. The attack on September 6th resulted in plaintiff's mother falling out of her wheelchair and hitting her head, causing multiple subdural hematomas.

In order to establish liability, plaintiff alleged that defendant had a duty to provide a safe environment, to develop a plan of care for its residents, to hire qualified employees and to provide proper supervision of those employees. Plaintiff's complaint then alleges that defendant breached those duties, resulting in plaintiff's mother sustaining "among other injuries, chronic subdural hematomas requiring multiple surgeries to drain fluid from her brain." Plaintiff therefore sought damages from defendant in the form of money paid for past and future medical, surgical and hospital care and treatment, all damages resulting from plaintiff's mother being disabled and unable to attend to many of her affairs, and for her general, physical and mental anguish. In other words, all damages plaintiff sought were for the injury suffered on September 6, 2000. There was no allegation of any injury occurring before then, or after that time. Consequently, the \$27,500 payment made by defendant and the \$125,000 arbitration award compensated plaintiff for the same injury, and constituted a double recovery.

The majority recognizes the conclusion reached above, but opines that this was not a double recovery because the release and settlement agreement was limited to any possible causes of action that accrued prior to July 2, 2000. Although I do not question plaintiff's ability to receive a partial settlement from defendant¹ for events that occurred prior to July 2, 2000, the question then becomes what effect does that payment have on the subsequent arbitration award. To answer that question, case law require us to focus upon what injury is sought to be compensated. *Grace, supra*. Plaintiff's complaint, as already noted, alleges only one injury, on one day, as a result of one incident. The complaint does not (nor could it) seek compensation for the possible negligence that occurred *before* she was injured, such as negligent supervision or negligent hiring practices;² instead, it seeks compensation for the multiple subdural hematomas that she suffered as a result of the negligence that allowed the attack to be perpetrated upon her, and which caused her injury. It is that injury that led to this lawsuit, which then led to the partial settlement agreement, and which ultimately led to the arbitration award. In simple terms, everything that occurred in this case spawned from September 6, 2000, injury. According to case law, plaintiff can only recover once for that injury. Consequently, I would affirm the trial court's decision.

/s/ Christopher M. Murray

¹ It must be remembered that this settlement was with defendant, not either of the insurance companies. The insurance companies were not parties to this case, and they only made payments on behalf of defendant.

² Indeed, plaintiff would not have had a cause of action against defendant on July 2, 2000, for all elements of a claim must exist before the claim can be brought, and plaintiff had not suffered any damages at that point. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479; 586 NW2d 760 (1998).